

May 20, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AARON C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 1:18-CV-03052-FVS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 12 and 15. This matter was submitted for consideration without oral argument. The plaintiff is represented by Attorney D. James Tree. The defendant is represented by Special Assistant United States Attorney Sarah L. Martin. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court **GRANTS** Plaintiff's Motion for Summary Judgment, ECF No. 12, and **DENIES** Defendant's Motion for Summary Judgment, ECF No. 15.

JURISDICTION

1 Plaintiff Aaron C. protectively filed for supplemental security income on
2 September 11, 2014, alleging an onset date of June 30, 2014. Tr. 192-97. Benefits
3 were denied initially (Tr. 101-09) and upon reconsideration (Tr. 113-19). Plaintiff
4 requested a hearing before an administrative law judge (“ALJ”), which was held
5 before ALJ Gordon W. Griggs on January 17, 2017. Tr. 45-75. Plaintiff was
6 represented by counsel and testified at the hearing. *Id.* The ALJ denied benefits
7 (Tr. 13-31) and the Appeals Council denied review. Tr. 1. The matter is now
8 before this court pursuant to 42 U.S.C. § 1383(c)(3).

9 **BACKGROUND**

10 The facts of the case are set forth in the administrative hearing and
11 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner.
12 Only the most pertinent facts are summarized here.

13 Plaintiff was 21 years old at the time of the hearing. Tr. 62. He testified that
14 he “went on to 8th grade, but [was] not sure if [he] finished the 7th grade.” Tr. 62.
15 His grandmother testified that he made it to 10th grade. Tr. 52. Plaintiff lives in
16 his grandmother’s shed during the summer and spring months. Tr. 55, 70. He has
17 limited work history sorting fruit and working in a warehouse; but the ALJ
18 determined that Plaintiff has no past relevant work. Tr. 25, 63-65. Plaintiff
19 testified that he only worked in each job for a week before he “stopped going,” and
20 his mother had to wake him up for work every day. Tr. 64-66. Plaintiff reported
21 that his mother and sister filled out his job application forms, and his mother fills
out his medical paperwork, because he doesn’t “understand a lot of some words.”

1 Tr. 67-68. He testified that he could not work anywhere other than his own house.
2 Tr. 70. Plaintiff's grandmother testified that he doesn't go anywhere because "he's
3 kind of got this agoraphobic stuff," is not capable of keeping a schedule without
4 help, is not capable of taking public transportation, and does not understand the
5 consequences of his behavior. Tr. 55-58.

6 **STANDARD OF REVIEW**

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. If the evidence in the record "is
20 susceptible to more than one rational interpretation, [the court] must uphold the
21 ALJ's findings if they are supported by inferences reasonably drawn from the
record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
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1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
21 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
C.F.R. § 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
4 "any impairment or combination of impairments which significantly limits [his or
5 her] physical or mental ability to do basic work activities," the analysis proceeds to
6 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
7 this severity threshold, however, the Commissioner must find that the claimant is
8 not disabled. 20 C.F.R. § 416.920(c).

9 At step three, the Commissioner compares the claimant's impairment to
10 severe impairments recognized by the Commissioner to be so severe as to preclude
11 a person from engaging in substantial gainful activity. 20 C.F.R. §
12 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
13 enumerated impairments, the Commissioner must find the claimant disabled and
14 award benefits. 20 C.F.R. § 416.920(d).

15 If the severity of the claimant's impairment does not meet or exceed the
16 severity of the enumerated impairments, the Commissioner must pause to assess
17 the claimant's "residual functional capacity." Residual functional capacity (RFC),
18 defined generally as the claimant's ability to perform physical and mental work
19 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
20 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

21 At step four, the Commissioner considers whether, in view of the claimant's
RFC, the claimant is capable of performing work that he or she has performed in
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1 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
2 capable of performing past relevant work, the Commissioner must find that the
3 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
4 performing such work, the analysis proceeds to step five.

5 At step five, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing other work in the national economy.
7 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
8 must also consider vocational factors such as the claimant's age, education and
9 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of
10 adjusting to other work, the Commissioner must find that the claimant is not
11 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to
12 other work, analysis concludes with a finding that the claimant is disabled and is
13 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

14 The claimant bears the burden of proof at steps one through four above.
15 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
16 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
17 capable of performing other work; and (2) such work "exists in significant
18 numbers in the national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
19 700 F.3d 386, 389 (9th Cir. 2012).

20 **ALJ'S FINDINGS**

21 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
activity since September 11, 2014, the application date. Tr. 18. At step two, the
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1 ALJ found Plaintiff has the following severe impairments: borderline intellectual
2 functioning, anxiety disorder, NOS, dysthymic disorder, polysubstance abuse, and
3 alcohol abuse. Tr. 18. At step three, the ALJ found that Plaintiff does not have an
4 impairment or combination of impairments that meets or medically equals the
5 severity of a listed impairment. Tr. 19. The ALJ then found that Plaintiff has the
6 RFC

7 to perform a full range of work at all exertional levels but with the following
8 nonexertional limitations. The claimant is limited to tasks that can be
9 learned in 30 days or less involving no more than simple work related
10 decisions and few workplace adjustments. The claimant is limited to no
11 more than occasional and superficial public interaction. The claimant can
12 interact with coworkers on a causal or superficial basis. However, the
13 claimant would not work well as a member of a highly interactive or
14 independent work group, such as a team type of setting.

15 Tr. 22. At step four, the ALJ found that Plaintiff has no past relevant work. Tr.
16 25. At step five, the ALJ found that considering Plaintiff's age, education, work
17 experience, and RFC, there are jobs that exist in significant numbers in the national
18 economy that Plaintiff can perform, including: icer, agricultural sorter, and
19 industrial cleaner. Tr. 26. On that basis, the ALJ concluded that Plaintiff has not
20 been under a disability, as defined in the Social Security Act, since September 11,
21 2014, the date the application was filed. Tr. 27.

ISSUES

22 Plaintiff seeks judicial review of the Commissioner's final decision denying
23 her supplemental security income benefits under Title XVI of the Social Security
24 Act. ECF No. 12. Plaintiff raises the following issues for this Court's review:

- 1 1. Whether the ALJ properly weighed the medical opinion evidence;
- 2 2. Whether the ALJ improperly discredited Plaintiff's symptom claims;
- 3 3. Whether the ALJ erred at step three; and
- 4 4. Whether the ALJ properly weighed the lay witness testimony.

5 **DISCUSSION**

6 **A. Medical Opinions**

7 There are three types of physicians: “(1) those who treat the claimant
8 (treating physicians); (2) those who examine but do not treat the claimant
9 (examining physicians); and (3) those who neither examine nor treat the claimant
10 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”

11 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).

12 Generally, a treating physician's opinion carries more weight than an examining
13 physician's, and an examining physician's opinion carries more weight than a
14 reviewing physician's. *Id.* If a treating or examining physician's opinion is
15 uncontradicted, the ALJ may reject it only by offering “clear and convincing
16 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
17 1211, 1216 (9th Cir.2005). Conversely, “[i]f a treating or examining doctor's
18 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
19 providing specific and legitimate reasons that are supported by substantial
20 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

21 “However, the ALJ need not accept the opinion of any physician, including a
treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (quotation and citation omitted).

3 Plaintiff argues the ALJ erroneously considered the opinion of examining
4 psychologist Thomas Genthe, Ph.D. ECF No. 12 at 13-15. In January 2015,
5 Plaintiff was referred to Dr. Genthe “for only an intellectual assessment.” Tr. 321.
6 Dr. Genthe examined Plaintiff and completed a psychological evaluation. Tr. 321-
7 27. Dr. Genthe opined that Plaintiff had marked limitations in his ability to (1)
8 understand, remember, and persist in tasks by following detailed instructions; (2)
9 learn new tasks; and (3) adapt to changes in a routine work setting. Tr. 322. Dr.
10 Genthe also assessed Plaintiff’s abilities in the following categories as “poor”:
11 ability to remember short, simple instructions and detailed instructions; ability
12 work with or near others, over a short or long period of time, without being
13 distracted by them; ability to keep track of time and finish work on time; ability to
14 respond appropriately to changes in the work setting; ability to sustain an ordinary
15 routine without supervision; and ability to multi-task. Tr. 323.

16 The ALJ accorded “less weight” to Dr. Genthe’s opinion for two reasons: (1)
17 it was inconsistent with the objective medical records as a whole, specifically,
18 mental status examinations of Plaintiff that “demonstrated [Plaintiff] was not as
19 limited as Dr. Genthe opined”; and (2) it was “inconsistent with his own mental
20 status examination.” Tr. 24. The consistency of a medical opinion with the record
21 as a whole is a relevant factor in evaluating that medical opinion. *See Orn v.
Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). *Batson v. Comm'r Soc. Sec. Admin.*,

1 359 F.3d 1190, 1195 (9th Cir. 2004) (ALJ may discount an opinion that is
2 conclusory, brief, and unsupported by the record as a whole, or by objective
3 medical findings). Moreover, the ALJ may properly reject a medical opinion if it
4 is inconsistent with the provider's own treatment notes. *Tommasetti v. Astrue*, 533
5 F.3d 1035, 1041 (9th Cir. 2008). Plaintiff argues the ALJ (1) did not provide the
6 requisite explanation as to how the mental status examinations, including the
7 mental status examination performed by Dr. Genthe, "are purportedly in conflict
8 with Dr. Genthe's opinion"; and (2) "wholly disregarded the WAIS-IV results
9 upon which that opinion is based." ECF No. 12 at 14. The Court agrees.

10 Here, in support of his finding, the ALJ generally cites four mental status
11 examinations of Plaintiff from the relevant adjudicatory period, including Dr.
12 Genthe's examination in January 2015. Tr. 24 (citing Tr. 276, 298-99, 324-25,
13 331). As noted by Defendant, these exams largely found that Plaintiff had normal
14 thought process and content, normal attention and concentration, normal memory,
15 and normal abstract thinking. ECF No. 15 at 12-13. However, as noted by
16 Plaintiff, one of the mental status examinations noted Plaintiff had decreased eye
17 contact, anxious and depressed mood with constricted affect, fair judgment, partial
18 insight, poor abstract ability, and fair attention and concentration. Tr. 331.
19 Moreover, and most notably, Plaintiff was referred to Dr. Genthe specifically for
20 an intellectual assessment, but the ALJ entirely failed to consider the objective
21 cognitive testing performed by Dr. Genthe as part of his evaluation. ECF No. 12 at
14-15. Based on those cognitive tests, Dr. Genthe assessed Plaintiff's "general

1 cognitive ability” in the “borderline range of intellectual functioning”; his “overall
2 thinking and reasoning abilities exceed those of only approximately 4% of
3 individuals his age”; his verbal and nonverbal reasoning abilities are in the
4 extremely low range; his ability to sustain attention, concentration, and exert
5 mental control is in the average range; and his ability in processing simple or
6 routine visual material without making errors is in the low average range. Tr. 325-
7 27.

8 Defendant argues that Plaintiff’s argument “merely invites this Court to
9 ignore the substantial evidence that was inconsistent with Dr. Genthe’s opinion –
10 including Dr. Genthe’s own findings – in favor of an interpretation of the record
11 that [Plaintiff] would find more beneficial.”¹ ECF No. 15 at 14; *Burch v.*

12

13 ¹ Defendant also argues that Plaintiff “fails to acknowledge the apparent
14 inconsistencies between the limitations that Dr. Genthe assessed and his
15 conclusions based on the WAIS-IV results.” ECF No. 15 at 14. However, the ALJ
16 only rejects Dr. Genthe’s opinion as inconsistent with the *mental status*
17 examinations, and does not address the WAIS-IV test results. Tr. 24. Thus, the
18 Court is not permitted to consider this reasoning as it was not offered by the ALJ in
19 the decision. *See Bray*, 554 F.3d at 1226 (the Court “review[s] the ALJ’s decision
20 based on the reasoning and factual findings offered by the ALJ—not *post hoc*
21 rationalizations that attempt to intuit what the adjudicator may have been
thinking.”).

1 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (“where evidence is susceptible to
2 more than one rational interpretation, it is the [Commissioner’s] conclusion that
3 must be upheld.”). However, it is well-settled in the Ninth Circuit that the ALJ
4 “must explain why significant and probative evidence has been rejected.” *Vincent*
5 *v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). The Court finds the ALJ erred
6 by failing to consider Dr. Genthe’s objective cognitive testing, because it was
7 significant and probative evidence conducted for the express purposes of assessing
8 Plaintiff’s claimed intellectual impairments. Moreover, when explaining his
9 reasons for rejecting medical opinion evidence, the ALJ must do more than state a
10 conclusion; rather, the ALJ must “set forth his own interpretations and explain why
11 they, rather than the doctors’, are correct.” *Reddick v. Chater*, 157 F.3d 715, 725
12 (9th Cir. 1998). “This can be done by setting out a detailed and thorough summary
13 of the facts and conflicting clinical evidence, stating his interpretation thereof, and
14 making findings.” *Id.* Here, the ALJ fails to summarize and interpret Dr.
15 Genthe’s cognitive testing as part of his analysis; thus, the ALJ’s rejection of Dr.
16 Genthe’s opinion as inconsistent with his mental status examination results does
17 not account for the full extent of Dr. Genthe’s clinical findings, and is not
18 supported by substantial evidence.

19 Based on the foregoing, this was not a specific and legitimate reason for the
20 ALJ to reject Dr. Genthe’s opinion, and it must be reconsidered on remand.

21 **B. Additional Assignments of Error**

1 Plaintiff also challenges the ALJ's rejection of Plaintiff's symptom claims,
2 his rejection of the lay witness testimony of Plaintiff's mother and grandmother,
3 and the ALJ's conclusion at step three that Plaintiff does not meet the severity of
4 Listing 12.05B. ECF No. 12 at 2-13, 16-20. Because the analysis of these
5 questions is dependent on the ALJ's evaluation of the medical opinion evidence,
6 which the ALJ is instructed to reconsider on remand, the Court declines to address
7 these challenges here. On remand, the ALJ is instructed to conduct a new
8 sequential analysis after reconsidering the medical opinion evidence.

9 **REMEDY**

10 The decision whether to remand for further proceedings or reverse and
11 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
12 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
13 where "no useful purpose would be served by further administrative proceedings,
14 or where the record has been thoroughly developed," *Varney v. Sec'y of Health &*
15 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
16 remand would be "unduly burdensome[.]" *Terry v. Sullivan*, 903 F.2d 1273, 1280
17 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (noting that a
18 district court may abuse its discretion not to remand for benefits when all of these
19 conditions are met). This policy is based on the "need to expedite disability
20 claims." *Varney*, 859 F.2d at 1401. But where there are outstanding issues that
21 must be resolved before a determination can be made, and it is not clear from the
record that the ALJ would be required to find a claimant disabled if all the

1 evidence were properly evaluated, remand is appropriate. *See Benecke v.*
2 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,
3 1179-80 (9th Cir. 2000).

4 The Court finds that further administrative proceedings are appropriate. *See*
5 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)
6 (remand for benefits is not appropriate when further administrative proceedings
7 would serve a useful purpose). Here, the ALJ improperly considered medical
8 opinion evidence, which calls into question whether the assessed RFC, and
9 resulting hypothetical propounded to the vocational expert, are supported by
10 substantial evidence. “Where,” as here, “there is conflicting evidence, and not all
11 essential factual issues have been resolved, a remand for an award of benefits is
12 inappropriate.” *Treichler*, 775 F.3d at 1101. Instead, the Court remands this case
13 for further proceedings. On remand, the ALJ must reconsider the medical opinion
14 evidence, and provide legally sufficient reasons for evaluating these opinions,
15 supported by substantial evidence. If necessary, the ALJ should order additional
16 consultative examinations and, if appropriate, take additional testimony from
17 medical experts. The ALJ should also reconsider the step three findings,
18 credibility analysis, and lay witness testimony. Finally, the ALJ should reassess
19 Plaintiff’s RFC and, if necessary, take additional testimony from a vocational
20 expert which includes all of the limitations credited by the ALJ.

21 **ACCORDINGLY, IT IS HEREBY ORDERED:**

1. Plaintiff’s Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, ECF No. 15, is **DENIED**.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the Plaintiff, and **CLOSE** the file.

DATED May 20, 2019.

s/Fred Van Sickle

Fred Van Sickle

Senior United States District Judge